

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAE L. BOWSER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Butler, PA

*Docket No. 99-554; Submitted on the Record;
Issued October 19, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the basis that she refused suitable work.

The Office accepted that appellant's January 23, 1978 slip and fall at work resulted in protrusion of the intervertebral disk at L4 and in surgery for this condition, which was performed on May 15, 1978. Based on the March 7, 1983 opinion of an impartial medical specialist resolving a conflict of medical opinion, the Office also accepted that appellant's January 23, 1978 employment injury resulted in an aggravation of a preexisting left hip condition and in the deterioration of her left hip prosthesis, which was replaced on July 9, 1980.

Appellant received continuation of pay from January 23, 1978 until her return to work on February 6, 1978. She also received continuation of pay followed by compensation for temporary total disability for recurrences of disability from May 8 to October 30, 1978 and from January 4 to February 19, 1979. Appellant's disability retirement was approved effective August 7, 1980; she elected to receive benefits under the Federal Employees' Compensation Act in preference to those under the Civil Service Retirement Act. The Office resumed payment of compensation for temporary total disability effective August 7, 1980.

On July 15, 1998 the employing establishment offered appellant a position as a desk clerk/greeter for four hours per day, five days per week. By letter dated July 28, 1998, the Office advised appellant that it had reviewed the offer and found it suitable; the Office advised appellant that a partially disabled employee who refuses suitable work is not entitled to further compensation and gave appellant 30 days to accept the offer or provide an explanation for refusing it. Appellant indicated she would return to work on August 4, 1998, but on July 27, 1998 indicated she was declining the offer and desired to pursue disability retirement. On August 4, 1998 she called the employing establishment and advised that she would not be returning to work, as her doctor had not released her for the offered duty. By letter dated August 10, 1998, the Office advised appellant that the weight of the medical evidence supported

her ability to perform the position of desk clerk/greeter. Noting that appellant had expressed an interest in disability retirement in lieu of the job offer, the Office sent appellant an election of benefits form and requested that she return it within 15 days. The Office's letter concluded, "Otherwise we will proceed with our next action in your claim."

By decision dated August 31, 1998, the Office terminated appellant's compensation effective September 13, 1998 on the basis that she refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.¹ To justify termination of compensation, the Office must establish that the work offered was suitable.²

The Board finds that the Office improperly terminated appellant's compensation on the basis that she refused suitable work.

There is a conflict of medical opinion on the question of whether appellant is physically capable of performing the offered position of desk clerk/greeter. Dr. John W. Lehman, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, concluded in an April 20, 1998 report that in his opinion appellant was capable of doing the job of desk clerk/greeter, a description of which the Office provided to Dr. Lehman. Dr. Lehman stated, "I feel she [wa]s recovered well from all her problems and indeed has minimal objective findings, not as one would expect for all the problems and surgeries she has had." Appellant's attending physician, Dr. Samuel I. Han, a Board-certified internist, also was provided with a copy of the employing establishment's description of the position of desk clerk/greeter; Dr. Han stated in an April 3, 1997 report that appellant could not perform the duties of this position. He stated, "In addition to gait disturbance from hip surgery, she has congestive heart failure, hypertensive heart disease. Work not advised at her age."³ In a report dated December 16, 1997, Dr. Han concluded that appellant was totally disabled permanently.

The Board further finds that the Office also did not properly terminate appellant's compensation for the reason that it did not fully afford her the procedural protections set forth in *Maggie L. Moore*.⁴ Specifically, the Office, after advising appellant in its August 10, 1998 letter that it found her reason for rejecting the offer unjustified, did not afford appellant 15 days to

¹ 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

² *David P. Camacho*, 40 ECAB 267 (1988).

³ Conditions not related to employment are considered in determining whether an offered position is suitable, whether such conditions are preexisting (20 C.F.R. § 10.124(c)) or were acquired subsequent to the employment injury (Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b(4) (December 1993)).

⁴ 42 ECAB 484 (1991); *reaff'd on recon.* 43 ECAB 818 (1992). These procedures are set forth at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5d (July 1997).

accept the position. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work.⁵

The decision of the Office of Workers' Compensation Programs dated August 31, 1998 is reversed.

Dated, Washington, D.C.
October 19, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Maggie L. Moore*, 42 ECAB 484 at 489 (1991).